No. 12027

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF FRANK K. SULLIVAN, Deceased, by FLOYD K. SULLIVAN, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF OF PETITIONER.

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Preliminary Statement.

Most of the points raised and arguments made by respondent in his brief were anticipated and adequately discussed and answered in the Brief of Petitioner and Brief of *Amici Curiae* heretofore filed in the above-entitled Court in this cause, and we shall attempt to avoid repetition herein of matters set forth in the two briefs last mentioned.

Petitioner approves and adopts, as a supplement to his briefs, the Brief of *Amici Curiae,* which was filed after petitioner's first brief was filed herein.

Reference in both of petitioner's briefs to portions of the Transcript of Record are expressed by the abbreviation "Tr." References herein to the briefs heretofore filed by petitioner and the *amici curiae* are expressed by the abbreviations "Pet. Br." and "A. C. Br." respectively.

Respondent's Statement of Questions Presented.

Comment upon respondent's statement of Questions Presented appears desirable to clarify and possibly to simplify the issues involved in the cause under review.

In the brief heretofore filed by petitioner in this Court it was contended, among other things, that the securities aggregating $12,340.63 in value, standing in the name of decedent alone at the time of the gifts to Floyd K. Sullivan, decedent's son, were then owned by decedent and his wife as joint tenants, that only an undivided one-half interest in the donated securities was transferred by decedent, and that the value of the property interests transferred by decedent to his son did not exceed $16,763.27, or in any event did not exceed $22,933.59. Petitioner complained of the findings of fact and conclusions of law (*i. e.*, "holdings") and decision of the Tax Court to the extent that they were inconsistent or in conflict with or failed to support these contentions, and error was assigned accordingly. (Pet. Br. pp. 9-10, 17-18, 21-24, 27-29, 41-50, esp. pars. (2)-(6), (9), (10), (13), (35) and (36) of Specification of Errors, Pet. Br. pp. 22-27.)

No reference to any of these contentions is made in respondent's Statement of Questions Presented. (Resp. Br. pp. 2-3.) However, respondent concedes in his brief that all of the property given by decedent and his wife to their son was owned and held by the donors as joint tenants at and immediately prior to the time the gifts were made, and respondent construes the findings of fact made by the Tax Court as so declaring in substance and effect. (Resp. Br. pp. 14-15.) Although petitioner does not agree with this construction of the findings, he believes it is in accord with the true facts and does not object to having

the case decided on the basis thereof. If the findings are so construed, we submit that all of the donated securities were owned by decedent and his wife as joint tenants at the time the gifts to the son were made; that, for reasons set forth in our earlier brief, decedent could not have transferred more than an undivided one-half interest in such securities to his son in contemplation of death or otherwise; and that no part of the value of such securities in excess of $16,763.27 (one-half of the total value of the securities) was includible in his gross estate under I. R. C. Section 811(c) even if such one-half interest had been transferred in contemplation of his death. (Pet. Br. pp. 29, 41-50. See also, A. C. Br. pp. 6-13.)

In the brief heretofore filed by petitioner in this Court it was also contended, among other things, that the parcel of real property of the value of $1,500 standing in the name of decedent alone at and immediately prior to the execution of the agreement of November 24, 1943, was then owned by decedent and his wife as joint tenants, and petitioner complained of the failure of the Tax Court to find so specifically, and assigned such failure as error. (Pet. Br. pp. 16, 19, 31, 32, 56-60, esp. pars. (15), (16) of Specification of Errors, Pet. Br. p. 24.) Had the Tax Court made such a finding of fact, the findings would have supported petitioner's contention that all of the properties affected by the agreement of November 24, 1943, were owned and held by decedent and his wife as joint tenants at and immediately prior to the execution of the agreement, and under petitioner's view of the case—and that of the *amici curiae*—no part in excess of one-half of the value of such properties was includible in decedent's gross estate (the includible portion being the value

of decedent's undivided one-half interest as a tenant in common with his wife). Petitioner contended further that if the parcel of real property standing in decedent's name alone when the agreement was executed was not then owned by him and his wife as joint tenants, but was then solely owned by him, the only interest he transferred to his wife was an undivided one-half interest (valued at $750) in said parcel of land; or, if any transfer was involved in the conversion of the joint-tenancy properties into tenancy-in-common properties, the amount by which the fair market value of the property transferred by decedent to his wife exceeded the value of the consideration therefor was not in excess of $750 (one-half of the value of the solely-owned parcel). Petitioner complained of the findings of fact and conclusions of law and decision of the Tax Court to the extent that they were inconsistent or in conflict with or failed to support these contentions, and error was assigned accordingly. (Pet. Br. pp. 16, 19, 24-25, 32, 58-59, esp. par. 19 of Specifications of Errors, Pet. Br. pp. 24-25.)

The significance of these contentions is apparent when the language of respondent's regulations is considered. Reg. 105, Sec. 81.15, which applies to transfers in contemplation of death under I. R. C. 811(c), provides in part as follows:

> "If a portion only of the property were so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in ascertaining the value of the gross estate.
>
> * * * * * * * *

> "If the price was less than such a consideration, *only the excess of the fair market value of the property* (as of the date of decedent's death, or as of the applicable date under such an election as is mentioned in the last preceding paragraph) *over the price received by the decedent should be included in ascertaining the value of the gross estate.*" (Italics ours.)

In his Statement of Questions Presented respondent ignores the deficiencies in the findings, conclusions and decision of the Tax Court in connection with the $1,500 parcel. The only reference respondent makes in his brief to said parcel is found in his statement of facts, where he erroneously refers to the parcel as one of a value of $750 and says it "was held by the decedent alone." (Resp. Br. p. 4 Cf. [Tr. p. 29, par. 4(b).])

Respondent also ignores in his Statement of Questions Presented the question whether the holding that the value of the properties, exclusive of those given to decedent's son, was includible in decedent's gross estate under I. R. C. Section 811(e)(1), was unsupported by the findings of fact, and the question whether respondent was and is estopped and precluded by the provisions of and omissions from his notice of deficiency from assessing any deficiency based upon his inclusion in the value of the decedent's gross estate under I. R. C. Section 811(e) of the value of any of the properties involved exclusive of the United States Savings Bonds. (See Pet. Br. pp. 9, 15-16, 20, 21, pars. (8), (15); pp. 26-27, pars. (26), (34); pp. 32-34, pars. III. E 1., III. F. 3., and IV; pp. 56, 64, 67-73, 74.)

Respondent's failure to recognize these questions relating to I. R. C. Section 811(e)(1) is undoubtedly explained by the fact that even respondent cannot accept as sound reasoning the legerdemain by which the Tax Court reached its conclusions in this case. We acknowledge that correct analysis of the Tax Court's opinion and holdings in this case is difficult, but we submit that what the Court actually did, contrary to all precedent and authority, was to give I. R. C. Section 811(c) the effect of a transaction-avoiding law, and then to apply I. R. C. Section 811(e)(1) retroactively, both to the transaction involving the gifts to decedent's son and to the transaction whereby the joint-tenancy properties were converted into tenancy-in-common properties. (See Pet. Br. pp. 56; 68-69.) The references made by the Court to Section 811(e)(1), the emphasis placed upon the original source of the property, the suggestion that petitioner was charged with the burden of proving that decedent did not supply all of the property and the consideration therefor, the assertion that the "transfers" did not "serve to make the situation any different from what it would have been if the decedent had died immediately before making the gift to his son and executing the agreement of November 24, 1943, with his wife," and other assertions made in the opinion of the Tax Court show clearly that the Court was invoking Section 811(e)(1) as the taxing section. [Tr. pp. 112-114.] Contribution is material to an application of that section, but has nothing to do with Section 811(c).

The fact that respondent does believe that I. R. C. Section 811(e)(1) may not properly be invoked in support of the asserted deficiency clearly appears from the following two passages from his brief:

On pages 9-10 of his brief he says:

> "The Tax Court included the value of the property here in question in the decedent's gross estate under Section 811(c) of the Internal Revenue Code on the basis of its finding that the decedent had made the transfers of his interest therein in contemplation of his death within the meaning of that section. *It did not include it under Section 811(e) as jointly held property,* as the taxpayer (as well as the friends of the Court) contends." (Italics ours.)

After referring to petitioner's "misconception of the Tax Court's findings and the basis of its decision" (Resp. Br. p. 15), respondent says, at page 16 of his brief:

> "The taxpayer's contention in this regard is, however, without basis in point of fact. To the contrary, the express finding of the Tax Court is that both the gift and agreement were made in contemplation of the decedent's death and, in this connection, that the agreement was not a *bona fide* sale for adequate and full consideration in money or money's worth. [R. 101.] Obviously, that finding is one which is solely designed to bring both the gift and the contract within the contemplation of death provisions of Section 811(c). By contrast, *there is no finding either circumstantial or otherwise which would justify the inclusion of the value of the property in the decedent's*

gross estate under Section 811(e)(1), so that on its face the taxpayer's contention does violence to the Tax Court's findings and its decision which is based thereon." (Emphasis ours.)

It is clear from this statement that respondent agrees with petitioner that the asserted deficiency in this case may not be supported in whole or in part by the inclusion of the value of any property in decedent's gross estate under I. R. C. Section 811(e)(1). Since both parties are in agreement on this proposition, it appears that Section 811(e)(1) has ceased to be material to the case.

Also omitted from respondent's Statement of Questions Presented is the question whether the Tax Court erred in failing to make in its "Findings of Fact" a finding upon the issue whether, at the date of decedent's death, all of the property owned or held by him and his wife and each of them was owned by them as tenants in common in equal undivided shares and interests. (See Pet. Br. pp. 14-15, 19, 25, 60.) However, the Court in its opinion found and held that at the time of decedent's death his only interest in such property was that of a tenant in common. [Tr. pp. 91-101, 109.] Both parties agree that this holding is correct.

Other questions involved (*e. g.*, burden of proof) are ignored by petitioner in his Statement of Questions Presented, but we do not believe respondent disputes the position of petitioner with reference thereto, so we shall not discuss them herein.

Respondent's Statement of Case.

A number of inaccurate and incorrect assertions are made in respondent's Statement of the Case appearing on pages 3 to 9, both inclusive, of his brief. Some of these assertions require comment.

1. On page 4 of respondent's brief the following statement appears:

> "With respect to the tenure of his property, it was stipulated [par. 14, R. 35] and specifically found by the Tax Court [R. 99] that, prior to November 24, 1943, when the decedent and his wife *confirmed a previous gift* of property of the value of $33,526.54 to their son and made an agreement converting the balance of their property from joint into common property, . . . [Etc.]" (Italics ours.)

In fact the Tax Court made no finding and there was no evidence that decedent and his wife confirmed any gift to their son on November 24, 1943, when the conversion agreement was made. The evidence clearly showed that the gifts to the son and the conversion of the joint-tenancy properties into tenancy-in-common properties were separate and distinct transactions. At the time decedent and his wife formulated their intention to make the gifts to their son they had no thought of converting any of their joint-tenancy properties into tenancies in common. They initially consulted Mr. Triplett about gifts to their son and nothing else, and those gifts would have been made had nothing ever been said or done about the joint-tenancy conversion. The conversion was made solely as the result of suggestions made by Mr. Triplett and he made them gratuitously; that is, his advice was not sought about that subject until after he had first mentioned it to Mr. and Mrs. Sullivan. [Tr. 173-175, 180-181.]

2. On page 4 of respondent's brief reference is made to the parcel of real estate which stood in the name of the decedent alone at the time the agreement of November 24, 1943, was executed. Respondent recites that said parcel was of a value of $750. In fact the value of the parcel was $1,500, one-half of which was included in the value of decedent's gross estate by the executor and one-half of which was added to the value of said estate by respondent in his Notice of Deficiency. [Tr. 28-29, esp. par. 4(b), p. 29.]

3. On page 5 of respondent's brief the following statement is made:

"The decedent's loss therein was about $12,000."

According to the evidence and the findings the loss referred to was that of Floyd K. Sullivan, not the decedent. [Tr. 165, 93.]

4. On page 5 of respondent's brief the statement is made that in "1943 the decedent and his wife informed their son of their desire to make a gift to him, in order, as they then told him, to enable him to make payments on the mortgage on his house and to make it easier for him to meet his obligations." In footnote 2 on said page respondent asserts that the "son testified that this was in the middle of September, 1943." Respondent further asserts that "shortly thereafter on September 27, 1943," decedent and his wife "informed Triplett that the gift was intended to augment their son's income." (Resp. Br. p. 6.)

It is not true that the son testified that, in the *middle* of 1943, decedent and his wife informed him of their desire to make a gift, and there was no evidence and no finding that the information was given to Triplett *shortly* after the son was informed of his parents' desire to make

a gift to him. The son's testimony in this connection was as follows:

> "Q. In 1943, did your mother and father speak to you about making a gift to you? A. Yes." [Tr. 126.]
>
> . . . . . .
>
> "Q. If you recall, about what time was that meeting with Mr. Triplett? A. Well, it was about the middle of September, 1943." [Tr. 127.]

So far as the evidence discloses, the son may have been informed of his parents' desire to make a gift to him long before the middle of September, 1943, and it is possible that, when they met with Mr. Triplett, they had reasons additional to those originally existing, for making the gifts to their son.

5. In footnote 3 on page 5 of respondent's brief he says:

> "However, the lawyer Triplett testified that when he told the decedent and his wife at their first conference, held on September 27, 1943, that they could make a gift of $33,000 which would be free from the federal gift tax if they had made no prior gifts, the decedent's wife said that they, referring to herself and the decedent, did not have in mind giving him that much; what they wanted to give him was 'something that would give him some additional income.' [R. 175.] However, she later stated to Triplett that they had in mind giving their son 'about half of what I suggested they could give him.' [R. 175.]"

In footnote 4 on page 6 of respondent's brief he says:

> "We think it is obvious the decedent and his wife increased the amount of the gift which they had

originally intended to make to the son, as testified to by the witness Triplett, to the amount stated because of his advice that a tax free gift in the amount of $33,000 could be made by them. [R. 174.]"

The inaccuracy of respondent's statements above quoted is shown from the following excerpts from Mr. Triplett's testimony:

"I told them what the exclusions and exemptions were. They could *each* give their son—I think I said $33,000.00, that year, providing they hadn't made any previous gifts.

"I asked them if they had made any previous gifts to anyone. They said no, except Christmas and charitable, small gifts. I told them they could give their son *each* $33,000.00 without there being any federal gift tax.

"Mrs. Sullivan said, 'Well, we didn't have in mind giving him that much.' She said, 'What we wanted to give him, what we want to give him is something that will give him some additional income.' " (Italics ours.) [Tr. 174.]

. . . . . .

"But that *they* had in mind only giving him *about* one-half of what I suggested *they* could give him." (Italics ours.) [Tr. 175.]

In other words, according to the evidence, Mr. Triplett advised the decedent and his wife that they could make gifts aggregating $66,000 to their son without incurring any gift tax, provided they had made no previous gifts. The gifts which they finally made were gifts of property of an aggregate value of $33,526.54, which was "about" one-half of the value of the tax free gifts which they

might have made according to the advice given to them by Mr. Triplett. Of this matter the Tax Court said in its Findings of Fact:

> "They informed the attorney that all of their property was owned as joint tenants and that they had in mind a gift of about $33,000 to augment their son's income." [Tr. 93.]

6. At page 7 of respondent's brief the following statement is made:

> "Triplett expressed the opinion that the transaction would be a non-taxable exchange and that thereafter one-half of the property would be in the wife's estate, so that the ultimate tax savings would not be very much, and that such transfer would involve additional probate expenses."

Both the Tax Court [Tr. 95] and respondent misinterpret the testimony of Mr. Triplett in this connection. Mr. Triplett was not talking about tax *savings* at the time he gave the opinion to which respondent refers. In substance and effect he was pointing out that if the joint-tenancy properties were converted into tenancy-in-common properties and Mrs. Sullivan should predecease her husband, the estate taxes would be *increased* somewhat. And he said nothing about a "transfer." His testimony was as follows:

> "I told them I didn't think there would be any gift tax involved. I thought it was an exchange. And I told them that he was taking some chance, however, if his wife should die first, and that after they reached such a division half of it would be in her estate. Not that the amount was so large it made much difference

in tax consequences, but it would make some additional probate expense. I explained that to them." [Tr. 181.]

7. At page 8 of respondent's brief in referring to a chronology of events it is said that on "November 26, 1943, a letter was written by the First California Company . . ." This is identified as Exhibit 2-B. It should be noted that the mentioned letter was written November 26, 1947 (not 1943), a few days prior to the hearing before the Tax Court, and long after the transactions here concerned with occurred.

8. At page 10 of respondent's brief it is said that the case was reviewed by the entire Tax Court.

The opinion contains the following statement:

"Reviewed by the Court." [Tr. 114.]

We do not understand that this necessarily means that each and every member of the Court reviewed the case or the opinion. We do not know the facts in connection with the review of the present case. However, we think it significant that three judges of the Tax Court dissented in the case of *Estate of Edwin W. Rickenberg, Deceased,* 11 T. C. ....., No. 1, C. C. H. Dec. 16, 483, decided July 7, 1948, in which the Court held that the entire value of California community property converted into tenancies in common by agreement of the spouses was includible in the value of the estate of the husband, who predeceased his wife. In that case, the case now under review was cited and relied upon in the opinion of the Court which was prepared by Judge Disney, the same judge who wrote the opinion in the present case.

Respondent's Argument and Summary Thereof.

We have already commented sufficiently upon the statement made by respondent in his Summary of Argument that the Tax Court did not include the value of the property here in question in decedent's gross estate under Section 811(e) as jointly held property, and to the statement made in respondent's argument that there is no finding which would justify the inclusion of the value of the property in decedent's gross estate under Section 811(e)(1). (Resp. Br. pp. 10, 15.)

In respondent's Summary of Argument he says, among other things, in substance, that the brief of the *amici curiae* in effect concedes that the "transfers" were made by decedent in contemplation of his death. (Resp. Br. p. 10.) Respondent also says that the *amici curiae* do not discuss this question "because, in their view, it lacks importance." (Resp. Br. p. 20.) He also says that "the fact they do not attempt to support the taxpayer's contention that the gift and contract were not made by the decedent in contemplation of his death is adequately to be explained only on the ground that they regard such contention as insupportable." (Resp. Br. p. 21.) These assertions grossly distort the language of, or ignore, the following paragraph set forth on page 2 of the brief of the *amici curiae:*

> "We do not propose to take any position with respect to the first holding, i. e., contemplation of death. Since it is dependent on the particular facts as to decedent's state of mind, as well as the two-year statutory presumption, we do not consider this holding important *to our clients* or to taxpayers generally. We shall therefore *assume in this brief* that the Tax Court was correct in such holding, *although*

we do not thereby intend to express any views of our own on this subject. If this Court shall hold that the transfer was not in contemplation of death that is an end of the case." (Italics ours.)

Before leaving this quotation, we call attention to another reckless and inaccurate statement made by respondent concerning the brief of *amici curiae.* At page 20 of respondent's brief he says that: "These friends of the Court professedly *represent no clients directly interested* in the questions presented in this case, but only taxpayers generally who may be similarly situated and among whom some of their present and future clients may appear." (Italics ours.) The impropriety of this statement clearly appears not only from the quotation from the brief of *amici curiae* last hereinabove set forth, but from the following statement appearing on page 1 of the brief of *amici curiae:* "We do not act on behalf of any specific clients, but believe that certain legal issues are of importance to *various taxpayers whom we represent* as well as to taxpayers generally." (Italics ours.)

Respondent first argues that the "bundle of rights" which the decedent had in the property which he jointly owned with his wife is an interest in property within the meaning of I. R. C. Section 811(c); that such interest extended to the whole property; that the right of survivorship is an interest in the joint-tenancy property and that by the gifts to decedent's son and by the agreement of November 24, 1943, decedent made transfers of such interest including his right of survivorship. (Resp. Br. pp. 10-12; 22-34.)

That decedent's right of survivorship is not an interest in property within the meaning of I. R. C. Section 811(c), is, we think, adequately shown by the *amici curiae*

at pages 44 to 49, both inclusive, of their brief, which petitioner approves and adopts. Some comment should, however, be made herein about some of respondent's assertions upon this subject.

At page 11 of his brief respondent says, in substance, that decedent *transferred* his right of survivorship in the properties given to his son and in the joint-tenancy properties affected by the agreement of November 24, 1943. Similar assertions are made on pages 23 and 24 of his brief. The absurdity of this claim is obvious. If any right of survivorship possessed by decedent was transferred, who received it? Certainly the son received no such right; neither did decedent's wife. Decedent's right of survivorship as a joint tenant of the donated securities was extinguished when the gifts and transfers to his son were made, and his right of survivorship with reference to the remainder of the jointly held properties was extinguished when the agreement of November 24, 1943, was executed. Respondent recognizes the right of survivorship as an important incident of a joint tenancy (Resp. Br. p. 18), and he repeatedly recognizes that the conversion of the joint tenancies by agreement effected a complete destruction of the joint tenancies and every right, title and interest which each tenant had therein and substituted a wholly new and different tenancy therefor. (Resp. Br. pp. 25, 26, 28.)

At pages 11 and 12 of his brief respondent says: "But, as stated, we are not dealing here alone with the relinquishment of the right of survivorship. We are dealing with dispositions by the decedent of his interest in jointly held property, and such dispositions are 'transfers' within the meaning of Section 811(c)." It is a sufficient answer to this contention to point out that decedent, as one of two joint tenants, had no legal *power* to transfer

more than an undivided one-half interest in the jointly held properties. This proposition is elementary and requiries no citation of authority to support it.

At page 23 of his brief respondent correctly says that petitioner contends decedent and his wife each made a gift to their son of an undivided one-half interest in the donated property, but respondent incorrectly adds, in substance, that petitioner says each spouse owned an undivided one-half interest in the property. Petitioner merely said that the interests of decedent and his wife in the securities held in joint tenancy were *equal,* undivided interests. (Pet. Br. pp. 45, 43.) This statement of petitioner is correct whether each of two joint tenants has a single undivided title to the property or merely an undivided one-half interest therein. However, the California courts have held that each of two joint tenants has an undivided one-half interest in the property. (See cases cited, A. C. Br. pp. 6-11. See also C. C. Sec. 683, Pet. Br. p. 42.) And it is immaterial here whether the unity of title or undivided fractional interest view is accepted as correct because, as before stated herein, neither of the two joint tenants had the *power* to transfer more than an undivided one-half interest in the jointly held properties. In this connection attention is called to the following significant language found on pages 18 and 19 of respondent's brief:

> "A word should be said with regard to the taxpayer's contention that the *state law is controlling here. Of course it is,* but only to the extent that it determines the character of the interest which each joint tenant has in joint property, *including the extent of the power he has over its disposition.*
>
> . . . . . .

> "To sum up: The importance of the local law of property lies only in the fact that it is determinative of the right, title and interest of its owners therein, both before and after its disposition, including the time *and manner in which such right, title and interest may be disposed of.*" (Italics ours.)

We concede that I. R. C. Section 811(c) may, in certain cases, render a transfer of the undivided one-half interest of one of two joint tenants subject to estate taxes, but we deny that this is such a case. Here the requisite motive was lacking in each of the transactions involved; and there was no transfer involved in the conversion of the joint-tenancy properties into tenancy-in-common properties—in any event, there was no transfer for less than an adequate and full consideration in money's worth.

At page 24 of respondent's brief he appears to attach significance to the fact that no part of the property was shown originally to have belonged to decedent's wife or to have originated entirely with her. Respondent says that this (coupled with the existence of the right of survivorship) "brings the property in the first instance within the purview of another subsection of the statute, namely, Section 811(e)." (Resp. Br. p. 24.) But, as we have already observed, contribution has nothing to do with Section 811(c) and respondent has conceded that nothing can be taxable in this case under Section 811(e)(1)—a section under which contribution is material. (Resp. Br. pp. 10, 15.)

In footnote 8, appearing on page 25 of respondent's brief, respondent declares, in substance, that the contention of petitioner and the *amici curiae* that the agreement of November 24, 1943, was a sale for an adequate

and full consideration in money's worth is inconsistent with the contention of petitioner and the *amici curiae* that the agreement involved merely a release of the right of survivorship and no transfer of an interest in the property. These contentions are, of course, inconsistent. However, as respondent well knows, the contentions are made as alternatives, either of which, if sustained, suffice to remove the transaction from I. R. C. Section 811(c). The inconsistency has no significance.

At page 26 of respondent's brief it is said that the conversation of the joint-tenancy property into tenancy-in-common property destroyed "the old tenancy completely, and with it every right, title and interest which each tenant had therein, and substituted a wholly different tenancy therefor." Similar statements appear on pages 25 and 28 of respondent's brief. Respondent might well have added that with the destruction of the old tenancy the new tenancy—a tenancy in common—was created *by operation of law* and not by virtue of any transfer *inter vivos* by or to either of the tenants. It may also be observed that the destruction of the joint tenancy occurred during the lifetime of both tenants, making I. R. C. Section 811(e)(1) entirely inapplicable to the case. (See Pet. Br. p. 58.)

Throughout respondent's brief it is said that the contract (the agreement of November 24, 1943) involved a transfer of an interest in the property within the meaning of Section 811(c). Although petitioner denies that any transfer was involved in said contract, we repeat what was said in petitioner's brief herein that the decedent *could not* have transferred more, but may have transferred less to his wife than he received from her with reference to the joint-tenancy properties for the reason

that, due to her greater life expectancy, her right of survivorship was worth more than his.

The proposition that the interest of a joint tenant who has the greater expectancy of life is worth more than the interest of another joint tenant finds recognition and support in a letter to the First National Bank of Oregon, dated October 1, 1948, from D. S. Bliss, Acting Deputy Commissioner, reported at Par. 6028, CCH "Federal Estate and Gift Tax Reports." The opinion of Mr. Bliss was to the effect that the conversion of a tenancy by the entirety (in Oregon real property) into a tenancy in common is not a taxable gift if the spouses are of the same age, but if their ages differ, the transfer is taxable as a gift from the younger to the older to the extent of the value of the rights of the younger under the tenancy by the entirety less one-half the value of the property. With the conservatism for which the Commissioner of Internal Revenue is noted (where a candid statement might be deemed a recognition of taxpayer's rights) Mr. Bliss says:

> "It will be noted that this has no relation to the treatment of similar tenancies for estate tax purposes. This is due to the fact that the estate tax law and regulations relative to jointly owned property differ substantially from the gift tax law and regulations."

He adds:

> "It is assumed that the case of *Sullivan v. Commissioner* to which you refer is the case by that name recently decided by the Tax Court of the United States and reported at 10 T. C. 961. That case involved a joint tenancy in the State of California which differs from a tenancy by the entirety in the

> State of Oregon in that either tenant may sever his interest at any time without the consent of the other. Under the circumstances it is believed that that decision has no bearing on the question."

A comment on the ruling is found in "The Tax Barometer" issue of December 24, 1948, paragraph 55, where the following statement is made:

> "The ruling does not mention joint tenancies which may be severed by either party without the consent of the other. It would seem, however, that when there is such unilateral right of severance there is no gift tax on conversion of the tenancy into a tenancy in common."

Another comment on the ruling is found in "Estate and Tax News" (prepared by Prentice-Hall, Inc. for Title Insurance and Trust Company, Los Angeles), issue of January, 1949, wherein it is said:

> "Presumably, conversion of a joint tenancy into an equal tenancy in common would involve no gift tax."

However much Mr. Bliss may hedge in his ruling, excluding from it estate tax situations, and despite his insistence that the *Sullivan* case has no bearing on the question which he is discussing, there can be no doubt in logic or common sense that the principle he announces has application in estate tax cases and to joint tenancy situations just as it does in gift tax cases involving tenancies by the entirety; and there can be no doubt in law either. The gift tax and estate tax laws are to be construed in *pari materia*, as has often been held by the Courts. See for example, the case of *Merrill v. Fahs* (1945), 324 U. S. 308, 89 L. Ed. 963, upon which respondent places much reliance at pages 35-36 of his brief.

We submit, therefore, that, in the conversion of the joint tenancies into tenancies in common, Mrs. Sullivan parted with more than decedent did, and if there were transfers from one spouse to the other, decedent received more value—more "money's worth"—than he gave.

In support of his contention that the contract involved a transfer of an interest in the property within the meaning of Section 811(c), respondent invokes the rule of construction that a statute is to be so construed as to carry its purpose into effect. Respondent adds:

> "Particularly is this true with regard to statutory provisions which are enacted to prevent tax evasion. These must be fairly construed in order to effectuate their purpose." (Resp. Br. 28.)

It is perhaps sufficient to say in answer to these propositions that it is for Congress to determine the purposes of federal legislation, whether relating to revenue or otherwise, and to prescribe the applicable laws. Congress has not given the Commissioner of Internal Revenue *carte blanche* to construe the statutes. However, something else may be said in answer to respondent's propositions in this connection. It is an elementary and well-settled rule of law that taxing statutes are to be construed strictly in favor of the taxpayer and are not to be extended by implication beyond the clear import of the language used; and in cases of doubt or ambiguity every intendment is to be taken against the taxing powers.

In the estate-tax case of *Crooks v. Harrelson* (1930), 282 U. S. 55, 61, 75 L. Ed. 156, 176, the Court says:

> "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the

letter applies with peculiar strictness. In United States v. Merriam, 263 U. S. 179, 187, 188, 68 L. Ed. 240, 244, 29 A. L. R. 1547, 44 S. Ct. 69, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used,' we quoted with approval the words of Lord Cairns in Partington v. Atty. Gen. L. R. 4 H. L. 100, 122, that 'if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.'"

See also:

Porter v. Commissioner (1933), 288 U. S. 436, 442, 77 L. Ed. 880, 884;

Bowers v. N. Y. & Albany Lighterage Co. (1927), 273 U. S. 346, 350, 71 L. Ed. 676, 679;

Hecht v. Malley (1924), 265 U. S. 144, 156, 68 L. Ed. 949, 957;

Gould v. Gould (1917), 245 U. S. 151, 153, 62 L. Ed. 211, 213;

Corporation of America v. McLaughlin (1938—C. C. A. 9), 100 F. 2d 72, 77.

The remainder of the contentions of respondent that the "bundle of rights" possessed by decedent in the jointly held property is an "interest" of which the decedent made a "transfer" within the meaning of Section 811(c) of

the Internal Revenue Code are, we think, sufficiently answered by the briefs heretofore filed in this Court by petitioner and the *amici curiae*. (A. C. Br. pp. 44-47, 30-40; Pet. Br. pp. 28, 31-33, 57-58, 62-64.)

The second major point made by respondent in this argument is that the agreement of November 24, 1943, was not a sale for an adequate and full consideration in money or money's worth within the meaning of I. R. C. Section 811(c). (Resp. Br. p. 12; pp. 34-36.)

In his Summary of Argument respondent says, in substance, that the contract was not a sale for an adequate and full consideration in money or money's worth within the meaning of Section 811(c) because each joint tenant could have dissolved the tenancy by unilateral action even without the knowledge or consent of the other and could have relinquished his interest therein to the other without consideration. (Resp. Br. p. 12.) A similar statement appears on pages 34-35 of respondent's brief. This is a clear *non sequitur*. It does not follow that because a joint tenant may dispose of his or her interest without consideration that there may not be a consideration therefor. In the case now on review, we submit that if any transfer was involved in the conversion of the joint-tenancy properties into tenancy-in-common properties, it amounted to a sale for an adequate and full consideration in money's worth within the meaning of I. R. C. Section 811(c). (See Pet. Br. pp. 31, 32-34, 63-67; A. C. Br. pp. 13-29.)

On pages 35 and 36 respondent refers to and discusses the cases of *Merrill v. Fahs*, 324 U. S. 308; *Taft v. Bowers*, 304 U. S. 351, and *Giannini v. Commissioner*, 148 F. 2d 285, and respondent expresses astonishment

that the friends of the Court neither cited nor discussed these cases.

Merrill v.. Fahs was not discussed by petitioner (and in all probability was not discussed by the *amici curiae*) because it dealt solely with the subject of the relinquishment of marital (dower) rights pursuant to an antenuptial settlement as a consideration in money or money's worth within the meaning of the gift tax laws. In this case, no marital rights are involved. The issues in this case would be exactly the same as they are at present had all of the jointly owned properties been owned and held by the decedent and his brother (or a stranger) instead of by the decedent and his wife. Furthermore, in the *Merrill* case the Court held that mere detriment to the donee (relinquishment of dower rights) was not a consideration in money or money's worth. In the present case, if decedent transferred any property interest to his wife, she necessarily transferred a like and equal property interest (possibly one of greater value than she received) to him, and he received a benefit at least commensurate with what he transferred.

Respondent's comment on the *Giannini* case is misleading. In that case no rule of law was announced that "the existence of a legal consideration under local law in the family arrangements was immaterial under tax laws." (See Resp. Br. p. 36.) The case was decided on its peculiar facts, and the facts were that the consideration given by the deceased was grossly disproportionate to that which he received and he had acknowledged in writing that what he had received was a *gift*. This case is not pertinent to anything here involved.

The case of *Taft v. Commissioner* (1938), 304 U. S. 351, 82 L. Ed. 1393 (referred to as *Taft v. Bowers* on page 36 of respondent's brief) has no bearing, even remote, upon any of the issues of law or fact involved in the case under review. In the *Taft* case the Court was concerned solely with the question whether certain estate tax deductions claimed could be supported as enforceable claims against the estate or as charitable gifts.

The third major point advocated by respondent is that the value of the whole property subject to the gift and contract is includible in decedent's gross estate. (Resp. Br. pp. 12-13, 36-44.) We think that sufficient has been said herein and in petitioner's brief heretofore filed and in the brief of *amici curiae,* to refute fully and satisfactorily respondent's contentions with reference to this point.

The final major proposition asserted by respondent is that the gift and contract were substitutes for testamentary dispositions and were made by decedent in contemplation of his death within the meaning of Section 811(c). (Resp. Br. pp. 13-14, 45-58.) Here again nothing need be added by way of reply to what was said in petitioner's earlier brief, in this brief and in the brief of the *amici curiae*. However, we shall comment briefly upon some of the assertions of respondent.

He says that the "transfers" were made in anticipation of decedent's death in fear or expectation that it might not be long delayed. (Resp. Br. p. 46.) But decedent made his gifts to his son for the sole purpose of giving the son financial assistance. And although the conversion of the joint tenancies was the result of suggestions of his attorney [Tr. 99], decedent refused to become a mere life beneficiary under his wife's will, as advised by the

attorney, notwithstanding that a probate proceeding might thereby have been avoided and *estate tax savings effected* by doing so. [Tr. 100, 191; Resp. Br. pp. 8-9.] Far from having thoughts of his imminent death, decedent was considering what would happen if his wife should predecease him; he wanted an absolute interest in her property, believing that "he could look after his own affairs." [Tr. 100, 191; Resp. Br. p. 9.]

At page 46 of his brief respondent says:

> "On the other hand, the evidence beyond question sustains *the finding* that the gift, contract and will constituted an integrated transaction designed for the purpose of making a final disposition of all of the decedent's property and to do so in order to evade the federal tax, at least in part." (Italics ours.)

The Tax Court made no such finding.

Again at page 46 of his brief respondent departs from the record in fixing the time at which decedent and his wife first contemplated making a gift to their son, saying it was "as early as the first part of September, 1943." We have already pointed out herein that the son might have been *informed* of the contemplated gifts *any* time during 1943, prior to the middle of September, and when before that time his parents first *contemplated* making the gifts we do not know. It might even have been before 1943. On the same page respondent again misstates the record on the subject of Mr. Triplett's advice and the decision of Mr. and Mrs. Sullivan about the amount of the gifts. We have already commented sufficiently herein upon that subject.

Conclusion.

We again respectfully submit that the decision of the Tax Court should be reversed and that petitioner should be awarded his costs.

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